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In The Supreme Court of the United States

ROBERT F MCDONNELL,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE VIRGINIA LAW PROFESSORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONER ROBERT F. MCDONNELL

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INTEREST OF AMICI CURIAE

Amici curiae are professors of law at colleges and universities located in the Commonwealth of Virginia and file this brief to provide insight and analysis regarding pertinent Virginia statutes and the limits on application of federal law to state public officials from an academic perspective. The names and academic titles of the individual Virginia Professors of Law are provided in Appendix A.[1]

SUMMARY OF THE ARGUMENT

As the Court considers the conflict between the decision of the Court of Appeals for the Fourth Circuit ("the Fourth Circuit") and those of other Courts of Appeals which the Petition For Writ of Certiorari details, the Court should also recognize the extent to which a short-armed maneuver executed in pursuit of that decision places an important aspect of this case in conflict with relevant decisions of this Court and the Constitution. Despite the confinement of the federal honest services fraud statute and the Hobbs Act in bribery cases to "core bribery schemes," the Fourth Circuit avoided addressing the inconsistency in convicting a former Governor Robert F. McDonnell for such a supposedly "core" bribery scheme when his jury had

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of amici's intent to file this brief and consented to its filing by filing a letter granting blanket consent to *amicus curiae briefs*.

been instructed nothing in the case suggested he had violated Virginia law.

Indeed, when the District Judge instructed the jury that nothing in the case suggested McDonnell had violated Virginia law while he was a state official, the court foreclosed any appropriate means by which to convict the former governor of depriving the citizens of Virginia of the benefits of his "honest services" on their behalf through "extortion under color of right." As will be shown, the Fourth Circuit erred in framing the tests of McDonnell's guilt based upon definitions of bribery and official acts taken from federal statutes which apply only to federal public officials. Virginia has bribery and gift-giving statutes which outlaw the "core" bribery schemes covered by the federal honest services fraud statute and the Hobbs Act, and nuances of federal bribery law not found in Virginia law necessarily lie beyond that core. Principles of federalism dictate that federal charges rooted in claims of bribery against state public officials must be weighed first with reference to applicable state anti-corruption statutes which distinguish between bribes and lawful gifts and loans. These principles apply with particular force where, as here, federal authorities invade traditional provinces of the states via vague and open-ended federal statutes. Further, by subjecting McDonnell to the federal bribery statutes, the Fourth Circuit rendered the honest services fraud statute and the Hobbs Act unconstitutionally vague as applied to McDonnell because he lacked fair notice that his lawful receipt of items of value under Virginia law may have violated the terms of facially inapplicable federal

bribery statutes nonetheless and thereby subjected him to conviction for honest-services fraud and under the Hobbs Act. Despite, or on account of, this gaping hole in the reasoning used to ensnare McDonnell, the Fourth Circuit reframed the foregoing arguments as "narrowing arguments which presuppose the ambiguity of official acts" and dismissed them in a single, arid sentence in a footnote. Yet, the Fourth Circuit's maneuver places the premises for McDonnell's conviction in conflict with this Court's decisions and beyond the Constitution at the same time the Fourth Circuit's concept of "official acts" conflicts with those of other United States courts of appeals.

ARGUMENT

NEITHER THE HOBBS ACT NOR THE HONEST SERVICES FRAUD STATUTE CRIMINALIZE CONDUCT THAT IS LAWFUL UNDER STATE LAW

The unchallenged instruction to the jury that "there has been no suggestion in this case that Mr. McDonnell violated Virginia law" (Jury Instruction 65A) places the Fourth Circuit's reliance upon federal bribery statutes to define elements of bribery of a state public official at the forefront of the determination of the legitimacy of McDonnell's convictions. Despite the gloss "a bribe is a bribe is a bribe," different precedents and bodies of statutory law dictate different outcomes in close cases, particularly in a case like McDonnell's where one must assess whether benefits conferred were lawful gifts and loans intended to generate general goodwill rather than craven bribes accepted in exchange for specific exercises of gubernatorial powers upon matters that came before him by law. The differences between Virginia's bribery and corruption laws and the federal bribery statutes require a determination of the ultimate source of law by which to determine whether a state official has accepted a bribe or kickback in the first place.

Yet the Fourth Circuit engaged in no such inquiry. Instead, the Fourth Circuit treated McDonnell's arguments in this regard as mere detritus in the dust of the caravan of its reasoning regarding "official acts." In a footnote, the court's opinion states:

> Appellant's remaining narrowing arguments -- which invoke federalism concerns, the rule of lenity, and dicta in *Sun-Diamond* -- all presuppose inherent ambiguity in the statutory term "official act." However, as we have explained, the term is sufficiently definite as to make recourse to those canons unnecessary.

United States v. McDonnell, 792 F.3d 478, 509 n.19 (4th Cir. 2015).

The Fourth Circuit's refusal to consult applicable state anti-corruption laws to determine whether a state official has participated in a bribery scheme which subjects him to federal prosecution and conviction under the honest services fraud statute and the Hobbs Act conflicts with this Court's decisions defining the scope of the honest services fraud statute and the Hobbs Act, the principles of federalism embedded in the Constitution, and the necessity for fair notice of conduct prohibited by a statute. The district court's recognition of the lack of any hint that McDonnell violated Virginia law, as expressed in Jury Instruction 65A, demonstrates the prejudicial nature of the Fourth Circuit's reliance upon facially inapplicable federal bribery law and its statutory definition of "official acts." If McDonnell did not violate Virginia law, then his convictions under the honest services fraud statute and the Hobbs Act must be reversed.

I. This Court's Leading Decisions Interpreting Honest Services Fraud and Extortion Under Color of Official Right Compels Consideration of Applicable State Law in Determining Whether a State Official Committed Those Crimes by Accepting a Bribe or Kickback

A. Honest Services Wire Fraud and *Skilling*

Review of McDonnell's convictions under the honest services fraud statute necessarily begins with consideration of the Court's attempt in *Skilling v. United States*, 561 U.S. 358 (2010), to define the scope of behavior which supports such convictions. The facts before the Court posed the question whether the federal honest services fraud statute, 18 U.S.C. §1346, applied to breaches of fiduciary duty which did not entail the solicitation or acceptance of "side payments" from a third party, either as kickbacks or outright bribes. Congress enacted §1346 to include "a scheme or artifice to deprive another of the intangible right of honest services" within the prohibitions of the mail and wire fraud statutes in response to the decision in *McNally v. United States*, 483 U. S. 350 (1987). *Skilling*, 561 U.S. at 405. The Court concluded the statute "criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 409 (emphasis in original.)

The need to consult state law in connection with prosecution of a state official for honest services fraud is rooted in the pre-*McNally* jurisprudence which the decision in *Skilling* reinvigorated as the source of "core bribery and kickback schemes." That

body of jurisprudence includes cases which require proof of a violation of state law by state officials charged with depriving the citizens of honest services. *See, e.g., United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir. 1997) (en banc)(discussing pre-*McNally* holdings focusing on violations of state-law duties by state officials.) Such a conclusion is bolstered further by the Court's statement "our construction of § 1346 reach[es] only seriously culpable conduct." *Skilling*, 561 U.S. at 411 (internal quotation omitted.) Thus the district court's determination (unchallenged on appeal) that nothing suggested McDonnell had violated state law placed his conviction beyond the bounds of pre-*McNally* jurisprudence. The Fourth Circuit's avoidance of the issue conflicts with the analysis taught in *Skilling* and is the only means by which to skirt the significance for McDonnell's acquittal posed by the district court's determination.

The Court's reference to the federal bribery statute as a secondary definitional limitation in *Skilling* does not forestall the applicability of state law in prosecution of a state official for honest services wire fraud. After defining the outermost bounds of honest services wire fraud as "only the bribe-and-kickback core of the pre-*McNally* case law," the Court sought to reassure those concerned with arbitrary federal prosecutions by stating the "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* at 412. However, although the federal bribery statute forbids a public official from accepting anything of value in exchange for

performing an official act, 18 U.S.C. § 201(a)(1), the statute defines "public official" in a manner which excludes state officials.[2] 18 U.S.C. § 201(c)(1)(B). Thus the potential availability of federal statutes as a definitional resource does not trump pre-*McNally* jurisprudence which teaches a state official must have violated substantive state bribery law to be convicted of honest services fraud.

B. Bribery/Extortion under Color of Official Right under *Evans*

Contrary to the approach taken by the Fourth Circuit, the leading decision to apply the Hobbs Act to a local or state public official accused of receiving bribes provides no basis to look to federal bribery statutes to determine whether the official engaged in illegal conduct. In *Evans v. United States*, 504 U.S. 255 (1992), the Court considered whether, with respect to a public official, the Hobbs Act adopted a unique definition of "extortion under color of official right." *Id.* at 260-61. In the absence of a clear indication of such an intention by Congress, the Court instead looked to the common law definition, which was "the rough equivalent of what we would now describe as 'taking a bribe,'" *id.*, and concluded the fact the official had taken a bribe was "clear" based upon his receipt of cash to ensure his support

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[2] In pertinent part, "the term 'public official' means Member of Congress, Delegate, or Resident Commissioner or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof in any official function, under or by authority of any such department, agency, or branch of Government, or a juror." 18 U.S.C. § 201(a)(1).

and vote for a re-zoning proposal. *Id.* at 257, 260. Nothing in the Court's opinion suggests federal bribery law figures in the determination whether a state public official has taken bribes under the Hobbs Act.

Additionally, the Fourth Circuit's failure to consider McDonnell's compliance with state bribery laws conflicts with appellate decisions which preceded and followed the *Evans* decision and looked to state bribery laws to resolve the question whether the state and local officials in question took bribes in violation of the Hobbs Act. For example, in *United States v. Snyder*, 930 F.2d 1090 (5th Cir. 1991), the Court of Appeals for the Fifth Circuit agreed that "a jury must consider any applicable state law" to determine whether a state official had committed extortion under color of official right under the Hobbs Act. *Id.* at 1093. In *United States v. Gliottoni*, 75 F.3d 1097 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit found any distinction between the elements of extortion applied to a public official under the Hobbs Act and the elements of bribery under Illinois law "appear subtle at best." *Id.* at 1112. Finally, before the *Evans* decision ruled inducement was not an element of extortion under color of official right, the Sixth Circuit concluded the need for proof of inducement comprised the sole distinction between bribery/extortion "under color of official right" under the Hobbs Act and bribery under Michigan law. *United States v. Jenkins*, 902 F.2d 459, 464, 467 (6th Cir. 1990).

II. The Fourth Circuit's Failure to Apply State Law to the Question Whether McDonnell Committed Honest Services Fraud and Hobbs Act Extortion by Accepting Bribes Conflicts with this Court's Holdings Regarding Application of Federalist Principles Embedded in our Constitution

The Fourth Circuit overlooked this Court's decisions recognizing federalist principles which would dictate the application of Virginia's bribery and corruption laws, which McDonnell did not violate, to resolve the charges he violated the honest services fraud statute and the Hobbs Act as a state official. To construe federal statutes which intrude upon areas traditionally controlled by the states, the Court applies principles "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088, 189 L. Ed. 2d 1, 15 (2014). A court must be "certain" of Congress' intent before finding a federal law overrides the "usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U. S. 234, 243 (1985)). A "clear statement" of Congressional intent is a necessary condition for finding a statute has altered that balance in order to assure "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond*, 134 S. Ct. at 2089, 189 L. Ed. 2d at 13 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Among federalist tenets inherent in the Constitution's allocation of powers, the Court has recognized the critical principle "Congress does not normally intrude upon the police power of the States." *Id.* at 2092, 189 L. Ed. 2d at 16. Indeed, "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Id.* at 2089, 189 L. Ed. 2d at 13 (quoting *United States v. Morrison*, 529 U. S. 598, 618 (2000)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). For this reason the Court has cautioned "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.*

In *Skilling*, the Court upheld the honest services fraud statute's application to localized corruption and to private-sector fraud in order to reach "misconduct that might otherwise go unpunished," 531 U.S. at 413, n. 45, thereby clearing the way for federal prosecution of McDonnell. However, this Court has never found a correspondingly "clear legislative statement" Congress intended the federal bribery statute's standards and terms to supplant directly applicable state bribery and kickback statutes. Further, as discussed supra, the federal bribery statute's scope is defined to apply to bribes taken by federal officials

and lacks any express application to state officials. 18 U.S.C. § 201(a)(1).

Likewise, in *Evans*, the Court found no indication Congress intended for the Hobbs Act to displace the common law's treatment of "extortion under color of official right" as "the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260-61. The Court's decision makes no mention of the federal bribery statute whatsoever. Further, as will be shown, an additional principle of federalism resolves the inquiry with respect to whether the common law or specific state-law bribery provisions determine the criminal liability of state and local officials.

A federal statute which requires resort to other bodies of law to ascertain its reach cannot displace state law. Otherwise, the courts would "'give the state-displacing weight of federal law to mere congressional ambiguity.'" *Gregory v. Aschcroft*, 501 U.S. 452, 464 (1991)(quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed.1988)). Given the need to confine the reach of any federal legislative intrusion into the traditional provinces of state law to that degree Congress clearly declares, the Fourth Circuit should have found Virginia's bribery and anti-corruption laws solely inform the question whether McDonnell accepted a bribe and thereby furnish the predicate for a violation of the federal honest services fraud statute.

The honest services fraud statute and the Hobbs Act are even more opaque with respect to

their impact on state law than the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, which the Court found lacked any plain and unambiguous statement of intent to displace state law in *Ashcroft*, supra, and therefore should be construed to be congruent with state bribery law rather than to impose prohibitions beyond state law. Rather than plainly declare the nature of the respective prohibitions under the honest services fraud statute and the Hobbs Act, the statutes leave one to look elsewhere to grasp the behavior they attack: as discussed above, the common law determines that "extortion under color of official right" means "taking a bribe" and case law establishes that "a scheme or artifice to deprive another of the intangible right of honest services" refers to "bribe and kickback schemes at the core of pre-*McNally* case law." Because the statutes do not establish a pre-dominant source of bribery law, the decision in *Ashcroft* teaches Congress' intrusion into this particular traditional area of state jurisdiction has not displaced Virginia's bribery laws.

Recognition of state law as the source for the requisite underlying bribery or kickback scheme would not have permitted misconduct to go unpunished. The honest services fraud statute and the Hobbs Act remain rods federal prosecutors can apply when, in their judgment, state prosecutors fail to prosecute state and local officials' bribe-taking which impacts interstate commerce. However, state bribery laws establish the length and breadth of those rods because Congress did not expressly declare otherwise. Although this application of

federalist principle might fail where a state has no body of law to regulate corruption, such is not the case in the Commonwealth of Virginia where, as will be shown, the General Assembly has provided comprehensive guidance regarding gift-giving and bribery to officials and those who would judge them. As such, to be consistent with this Court's holdings, the Fourth Circuit should have held that to find violations of the honest services fraud statute and the Hobbs Act through acceptance of bribes by a state official, one must first determine whether the transactions in question constitute bribes under applicable state law.

III. Virginia's Comprehensive Anti-Corruption and Bribery Statutes Demonstrate the Prejudicial Effect of the Fourth Circuit's Failure to Defer to State Law to Determine Whether McDonnell Committed an Underlying Offense Sufficient to Convict Him Under the Honest Services Fraud Statute and the Hobbs Act

Virginia's statutes validate the appropriateness under federalism of reliance upon state laws to determine whether a state official accepted bribes or kickbacks subject to federal prosecution under the honest services fraud statute and the Hobbs Act. Legislatively, Virginia approaches corruption in state government from two directions. One set of statutes restricts the abilities of state officials to accept gifts, loans, and payments and to participate in certain business before the Commonwealth. Another statute criminalizes the receipt of bribes by such officials. Irrespective of

whether Virginia's approach is coterminous with standards the Federal Government applies to federal officials, the statutes reflect the considered, comprehensive determinations of a state's legislative body regarding prevention and punishment of corruption in state government. Accordingly, the federal courts (if not federal prosecutors) should regard such bodies of state law as the sole standard for determining whether gifts and loans provided to a state official such as McDonnell comprise bribes accepted in violation of the federal honest services fraud statute and the Hobbs Act.

With respect to bribe-taking by a state official such as the governor, Virginia defines the crime in a manner which is altogether different, but no less valid than, the federal bribery laws upon which the Fourth Circuit relied. Virginia's bribery statute provides an executive officer may not accept:

> any gift or gratuity or any promise to make a gift or do any act beneficial to such officer

if the officer accepts the gift, gratuity or promise:

> under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be *by law* brought before him *in his official capacity* or that *in such capacity* he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty *required by law*.

Va. Code § 18.2-439 (emphasis added.) Violation of the statute not only constitutes a felony but also compels the officer to forfeit his office and bars him from ever holding "any office of honor, profit or trust under the Constitution of Virginia." *Id.*

Thus the state bribery statute limits the scope of consideration which, when promised in exchange for a gift, would convert the gift to an illegal bribe. The Fourth Circuit failed to focus upon this fact despite its own recognition "the bribery statute does not encompass every action taken in one's official capacity " *United States v. Jefferson*, 674 F.3d 332, 356 (4th Cir. 2012). Virginia's statute focuses the inquiry upon actions of a state official acting in an official capacity upon matters which arise by law and discharging duties required by law.

Virginia's bribery statute dovetails with an entirely distinct statutory regime, codified as the "State and Local Government Conflict of Interests Act," devoted to regulation of gifts to state and local public officials, including the governor. The Act was adopted "for the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests" in order to assure Virginia's citizens "the judgment of public officers and employees will be guided by a law that defines and prohibits inappropriate conflicts and requires disclosure of economic interests" so the citizenry can "maintain[] the highest trust in their public officers and employees." Va. Code § 2.2-3100. The Act consists of no less than forty separate statutes and follows the theory of "sunshine laws" by requiring

disclosure of covered gifts, loans and other transactions as a means to prevent corruption.

The Act requires covered state officials to submit periodic forms which disclose their personal interests, as well as, *inter alia*, covered gifts, loans, holdings, and other transactions in order to vet compliance with the Act's restrictions. Va. Code §§ 2.2-3114 & 2.2-3117 With respect to all employees of the Commonwealth, the Act enumerates nine separate items of prohibited conduct regarding certain gifts, loans, and payments, Va. Code § 2.2-3103, imposes a one-year "blackout" on lobbying after an official leaves employment, Va. Code §§ 2.2-3104 & 2.2-3104.2, limits gifts to executive branch officials in connection with bids for state procurement, Va. Code § 2.2-3104.1, and restricts officials' personal interests in contracts and other transactions with governmental agencies, Va. Code §§ 2.2-3106 & 2.2-3112. The Act requires the governor and Virginia's other state elected officials, among others, to file a disclosure statement of their "personal interests," including specified gifts, loans, and investments semiannually. Va. Code §§ 2.2-3114(A) & 2.2-3117. Additionally, the Act requires officers and employees of state governmental agencies to disclose gifts from persons "seeking to become a party to a contract with the Commonwealth." Va. Code §§ 2.2-3101 & 2.2-3103.1(C).

With respect to gifts, the Act emphasizes disclosure. Significantly, the statute provides the bare timing, nature, and frequency of a state official's acceptance of gifts "shall not be subject to

criminal law penalties" even if they prompt reasonable questions regarding the official's impartiality or raise an appearance the official has used his public office for private gain. Va. Code § 2.2-3103. Instead, the knowing failure to disclose the gifts for public scrutiny is criminalized. Va. Code § 2.2-3120.

Thus Virginia has a thorough and sound statutory scheme for preventing corruption in state government. Gifts are to be disclosed, and knowingly failing to do so is a crime. Gifts accepted as part of an agreement to take an action in one's official capacity upon a matter which arises by law are deemed illegal bribes, conviction for the receipt of which is a felony which forfeits the recipient's office and bars him from high office forever.

If the Fourth Circuit had looked behind the district court's finding and instruction "there has been no suggestion in this case that Mr. McDonnell violated Virginia law," the Fourth Circuit would have been compelled to agree and to reverse McDonnell's convictions: McDonnell's conduct was consistent with state law. First and foremost, nothing in Virginia jurisprudence suggests that requesting a staff member to meet with a citizen regarding a scientific discovery for which the citizen sought further study; asking "interrogative" questions at a luncheon that featured discussion of the discovery; allowing the citizen to recommend persons the citizen deemed important to the development of his discovery as attendees to a party; and suggesting to other officials that they meet with the citizen to discuss his discovery's potential to

lower healthcare costs for state employees and their families constitute action by McDonnell on matters that arise "by law." He performed no duty of his office as governor and exercised no power delegated to him by Virginia law thereby.

McDonnell performed no task assigned to him by a state statute to benefit Jonnie R. Williams, such as the submission of a budget with funding earmarked for studies of Williams' discovery. *See* Va. Code § 2.2-1508(A). McDonnell made no disposition of a matter which Virginia law delegates to the governor, such as a request for a grant from the governor's discretionary Development Opportunity Fund for development of businesses within Virginia. See Va. Code § 2.2-115. Instead, McDonnell's actions amounted to courtesies by which a citizen seeking to transact business in the Commonwealth was steered toward appropriate officials so they, in turn, might perform their roles in government without any exercise of authority granted to McDonnell by Virginia law.

Although the Government attempted to sully the legality of the actions set forth in the preceding paragraph through allusions to the relative timing, frequency, and nature of the gifts and loans Williams provided, Virginia law expressly provides a state official's acceptance of gifts "shall not be subject to criminal law penalties" even if the bare timing, nature, and frequency of the gifts prompt reasonable questions regarding the official's impartiality or raise an appearance the official has used his public office for private gain. Va. Code § 2.2-3103. Instead, Virginia's bribery statute focuses first upon the

nature of the action taken by the state official and secondly upon direct evidence that taints the gift. Va. Code § 18.2-439. In order to encourage officials to comply with its "sunshine laws" through public self-disclosure, Virginia excludes prosecution based solely upon circumstantial ambiguities and appearances of impropriety. To close the loop, Virginia law criminalizes the failure to make appropriate and complete disclosures and provides that persons convicted of knowingly violating the requirements are subject to forfeiture of office. Va. Code §§ 2.2-3120 & 2.2-3122.

Virginia's anti-corruption approach enlists the powers of exposure, inquiry. criticism. censure, and voting alongside the threat of prosecution. Fighting corruption through a) requiring disclosure of covered gifts and other potentially illicit transactions for voters, candidates, colleagues, prosecutors, and journalists to see; b) criminalizing the failure to disclose covered transactions; c) criminalizing action upon matters that come before officials by law and the exercise of powers conferred by law in exchange for items of value; and d) imposing penal penalties and permanent debarment upon bribe-takers under Va. Code Va. Code § 18.2-439 is a pragmatic and balanced approach to the problem. Given the conceptual soundness of such a regime and McDonnell's acknowledged and demonstrable compliance therewith under the charges brought against him, the Fourth Circuit should have reversed McDonnell's convictions.

IV The Fourth Circuit's Reliance Upon Federal Bribery Law to Assess Whether Gifts and Loans Provided to a State Official Comprise Bribes Sufficient to Warrant Conviction for Honest Services Fraud and Extortion Under Color of Official Right Renders the Honest Services Statute and the Hobbs Act Unconstitutionally Vague as Applied to State Officials Because They Lack Fair and Appropriate Notice Facially Inapplicable Federal Bribery Law Determines the Legality of Their Conduct

The Fourth Circuit's adoption of the Government's view that federal bribery law determines whether a state official accepted a bribe and thus violated the honest services fraud statute and the Hobbs Act notwithstanding his compliance with state bribery laws renders the statutes void for vagueness as applied to the official. A penal statute which fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" violates the Constitution's guarantee of due process. *Skilling*, 561 U.S. at 402-03 (internal quotation omitted). Although this Court has mused that "[i]n [non-commercial] cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement," the concern for "fair notice" remains despite possibly being overshadowed in recent cases by parallel concerns with standard-less enforcement. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The relative importance accorded to the latter requirement may

derive from the fact that notable deficiencies in enforcement guidance would likewise fail to inform typical citizens of the scope of the prohibition. However, the sufficiency of the definiteness with which the prohibition is defined is particularly relevant when applying a statute to an elected state official who has legal counsel and other advisers employed by the state to orient and to advise him.

In *Skilling*, the Court found the honest services fraud statute provides fair notice of its prohibitions if the Court interprets it to apply only to bribery and kickbacks. 561 U.S. at 409. The Court relied upon a six decades-old decision to declare that despite historic debate over the precise scope and meaning of the statute, "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud." *Id.* at 412 (quoting *Williams v. United States*, 341 U. S. 97, 101 (1951)). By construing the law to apply only to "pikestaff-apparent" bribery and kickbacks, the Court thus believed it could link to at least sixty years' of notice as to the coverage of the law's prohibitions.

However, the Fourth Court's tacit application of the "'fair notice" standard to a state official like McDonnell conflicts with this Court's by failing to confine the "core" bribery and kickback schemes forbidden to state officials to those schemes which violate applicable state law. A construction which permits conviction where the underlying conduct solely violates federal law is void because of the recognized facial inapplicability of the federal laws to state officials.

For a state official to determine the applicability and operation of federal bribery laws with respect to his compliance with the honest services fraud statute and the Hobbs Act in the absence of a definitive ruling which settles the matter, the official would have to undertake a deep and uncertain foray into statutes and jurisprudence. Merely looking at federal bribery laws would not aid his inquiry because he would readily see they apply only to things of value given to federal officials. He would need to read *Skilling* and interpret the opinion to subject him to the federal bribery statutes notwithstanding their facial inapplicability in his capacity as a state public official. He would need to read *Evans* and, despite the absence of any reference to the federal bribery laws, divine that the bribe-taking necessary for the commission of "extortion under color of official right" likewise is governed by the federal bribery statute and judicial interpretations thereof. Then he would need to read the principal bribery statute and its accompanying definition of an official act. Even then, the official would need to conduct yet further research and analysis to determine whether and to what extent the statute imposes broader obligations than those imposed by applicable state law and then would need to resolve correctly any conflicts between them.

The Fourth Circuit failed to follow this Court's teachings to find that no definitive statement of Congressional intent settles the applicability of federal bribery laws to state officials with respect to the Hobbs Act and the honest services fraud statute and thereby provides the requisite fair notice to state officials that conduct which comports with state law

may nevertheless violate the honest services fraud statute and the Hobbs Act. Indeed, the majority opinion in *Skilling* prompts the contrary conclusion with respect to state and local public officials: the federal bribery statutes apply, if at all, in the context of honest-services fraud only to the extent they overlap with applicable state anti-corruption laws, and the federalist principles recognized in *Aschcroft* and *Atascadero* and applied most recently in *Block*, supra, would directly end the inquiry by reference to state law. Again, the opinion in *Evans* is wholly silent regarding the federal bribery laws. Congress has never expressed the requisite clear intention to apply federal bribery statutes to state and local officials in the context of the Hobbs Act and the honest services statute. Accordingly, the Fourth Circuit was obliged to recognize that application of the federal statutes in question to a state official such as McDonnell in a manner which effectively outlaws conduct which complies with applicable state law renders the statute void for vagueness.

Nothing in Virginia law suggests that when a state official asks a person to meet with a citizen, the state official has thereby performed a duty required by law or acted "upon a matter which arises by law." The law imposes no such duty to ask. The official is not thereby performing a task enumerated by statute in Virginia, such as the preparation and submission of a budget to the General Assembly. The official is not disposing of a request upon a matter which Virginia law delegates to the official for resolution, such as a request to a governor for a grant from the governor's discretionary fund for development of businesses within Virginia. Instead,

acts such as those committed by McDonnell and alleged to violate federal law are mere courtesies by which a person seeking to transact business in the Commonwealth is steered toward other officials without any exercise of gubernatorial power conferred by Virginia law.

CONCLUSION

For the foregoing reasons, amici curiae Virginia Law Professors, by counsel, respectfully recommend the Court grant the Petition for Writ of Certiorari.

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APPENDIX A
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